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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ALDRED NEAL,)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-3434-JAR
)	
D.F. LEWIS, et. al,)	
)	
Defendant.)	

MEMORANDUM AND ORDER DENYING MOTION FOR RECONSIDERATION

This matter comes before the Court on plaintiff Aldred Neal's Motion for Reconsideration (Doc. 68) pursuant to Fed. R. Civ. P. 60(b). Plaintiff asks the Court to reconsider its July 20, 2004, Memorandum Order and Opinion Granting Summary Judgment (Doc. 65) to defendants. Specifically, plaintiff asks this Court to consider his untimely response to the summary judgment motion in reexamining its prior ruling. For the reasons stated below, plaintiff's motion is denied.

Rule 60(b)(1) provides that "the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . [or] (3) fraud . . . misrepresentation, or other misconduct of an adverse party." Relief from judgment "is extraordinary and may only be granted in exceptional circumstances."¹ Plaintiff urges the Court to reconsider its summary judgment ruling on the grounds of excusable neglect and defendant William Cummings' alleged misconduct.

¹*Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

Excusable Neglect

To determine whether neglect is “excusable,” the Court must take account of all relevant circumstances surrounding a party's delay, including (1) the danger of prejudice to the other party or parties, (2) the length of the delay and its potential impact on the case, (3) the reason for the delay, including whether it was within the reasonable control of the party seeking relief, and (4) whether the movant acted in good faith.²

Here, all but one factor clearly weighs against plaintiff. The danger of prejudice to defendants is great if the Court reconsiders its summary judgment ruling in light of plaintiff's untimely response. Defendants expended considerable time and effort preparing their motion for summary judgment, which was filed on August 5, 2003, nearly a year before the Court ruled on the motion. In addition, on May 24, 2003, defendants filed a motion for ruling on their unopposed summary judgment motion, again expending time and effort on this case.

The second factor too counsels against granting plaintiff's motion. Plaintiff's delay is excessive; the Court granted plaintiff two extensions of time, giving him until February 28, 2004 or over six months to respond to defendants' motion. Instead of filing a response to defendants' motion, plaintiff filed a third request for an extension of time. On March 29, 2004, the Court denied plaintiff third request for an extension of time to respond to defendants' motion, stating:

The Court has already granted plaintiff's two previous requests for extensions, giving plaintiff over six months to respond to defendants' summary judgment motion. Because plaintiff has been accorded sufficient time to respond to defendants' motion, the court will not grant plaintiff's *third* motion for an extension of time. To do so would result in

²See *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

needless delay and waste judicial resources.³

Even after the Court denied plaintiff's third request for addition time, plaintiff still delayed before finally filing his response to the summary judgment motion on June 15, 2004. The Court does not consider a delay of almost a year to be "excusable neglect," even for a pro se plaintiff.⁴ The Court additionally observes that its summary judgment order was dispositive and the case has been dismissed; to require defendants to defend a case that has previously been dismissed on the merits would result in substantial prejudice.

Plaintiff does attempt to satisfy the third factor by informing the Court of the reason for his delay, his lack of access to the prison law library, and that the delay was not in his reasonable control. Plaintiff states that in order to go to the law library, he had to sign up on his way to dinner, but that because of his special diet, he eats last every day. Plaintiff does not inform the Court how many times he tried unsuccessfully to sign up, or how much time he actually spent in the prison library. Therefore, it is difficult for the Court to conclude that plaintiff's access to the law library was inadequate, particularly considering the extended time period plaintiff had to respond to defendants' motion.

The final factor, plaintiff's good faith, also weighs in defendants' favor. The Court questions plaintiff's good faith based solely upon his excessive delay. Plaintiff learned on or shortly after March 29, 2004, that his third request for an extension of time was denied. Yet, the Court received no

³Doc. 60.

⁴It is settled that plaintiffs are not excused from compliance with fundamental rules of procedure because they are proceeding pro se. *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994), *cert. denied*, 513 U.S. 1090 (1995). Pro se litigants must follow rules of procedure. *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992), *cert. denied*, 507 U.S. 940; *Campbell v. Meredith Corp.*, 260 F. Supp. 2d 1087, 1097 n.10 (D. Kan. 2003).

communication from plaintiff until he filed his untimely response two and half months later on June 15, 2004. Nor has plaintiff demonstrated that he diligently attempted to timely file a response. Rather, it appears plaintiff ignored the Court's order and deadlines, and now seeks that ignorance to be termed "excusable neglect." It is settled, though, that neither carelessness nor ignorance of the Court's rules and procedures provide a basis for granting a Rule 60(b) motion.⁵ In sum, plaintiff has not shown that his failure to timely respond to defendants' summary judgment motion was due to his excusable neglect.

Misconduct of an Adverse Party

Plaintiff argues that defendant William L. Cummings' misconduct provides a second ground for the Court to reconsider its prior ruling. A party seeking relief pursuant to Rule 60(b)(3) for "misconduct of an adverse party" must provide clear and convincing evidence of the misconduct.⁶ "[T]o be clear and convincing, evidence should be clear in the sense that it is certain, plain to the understanding, unambiguous, and convincing in the sense that it is so reasonable and persuasive as to make it believable."⁷

To support his claim that defendant Cummings' misconduct caused plaintiff's late filing, plaintiff argues that Cummings, as the superior of all principal administrators in the Kansas Department of Corrections, is directly or indirectly responsible for plaintiff's inadequate access to the law library. Plaintiff relies upon a grievance attached to his third motion for extension of time suggesting that was

⁵See *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

⁶See *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 952 (10th Cir. 1990), *aff'd*, 80 F.3d 1500 (10th Cir. 1996).

⁷*Gorman v. Best W. Int'l Inc.*, 941 F. Supp. 1027, 1031 (D. Kan. 1996); see also *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1194 (10th Cir. 2002).

denied adequate law library time, but the Court previously considered plaintiff's grievance in ruling on his request for additional time and found the grievance inadequate to justify an extension.⁸ Plaintiff additionally described the sign up process necessary to gain access to the library. However, he fails to inform the Court how much time he spent in the library over the six- month time period he was given to respond. Plaintiff was obviously allowed access to the library at least for some period of time as he ultimately filed an untimely response to defendants' summary judgment motion. On this showing, the Court finds that plaintiff's proffered evidence and averments are neither clear nor convincing and that plaintiff has fallen far short of showing necessary to demonstrate that Cummings misconduct caused plaintiff's delay.

Plaintiff's Summary Judgment Response

The Court notes that assuming, *arguendo*, plaintiff had satisfied his burden under Rule 60(b), consideration of his summary judgment response would not change the outcome of the Court's Order granting defendants' summary judgment motion. Even after considering plaintiff's response, the Court still finds that to the extent the prison officials were sued in their official capacities, they are absolutely immune from suit pursuant to the Eleventh Amendment and, that to the extent the official were sued in their individual capacities, they are entitled to qualified immunity. Plaintiff still has not stated a violation of the First Amendment based upon the Kansas Department of Corrections' policy of limiting prisoners to possession of twelve books, a due process violation when his books were destroyed without a pre-deprivation hearing, nor a denial of equal treatment claim based on his status as a Shiite Muslim.

⁸The Court notes that plaintiff never asked it to reconsider its Order denying plaintiff's third request for an extension of time.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff's Motion for Relief for Judgment or Order Excusable Neglect (Doc. 68) is DENIED.

IT IS SO ORDERED.

Dated this 1st day of September 2004.

S/ Julie A. Robinson

JULIE A. ROBINSON

United States District Judge